

15

No. 91-1526

Supreme Court, U.S.

FILED

OCT 29 1992

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Ferris J. Alexander, Sr.

Petitioner,

v.

United States of America

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF NATIONAL FAMILY LEGAL
FOUNDATION AND CHILDREN'S LEGAL
FOUNDATION AS AMICI CURIAE IN
SUPPORT OF THE UNITED STATES

James P. Mueller
Counsel of Record
Len L. Munsil
5353 North 16th Street, Suite 400
Phoenix, Arizona 85016
(602) 265-1513

TABLE OF CONTENTS

	<u>PAGES</u>
TABLE OF AUTHORITIES.....	iii
CONSENT OF THE PARTIES.....	1
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	4
LAW AND ARGUMENT.....	5
I. THE USE OF RICO WITH OBSCENITY OFFENSES IS SUPPORTED BY THE PURPOSE OF RICO AND PASSES MUSTER UNDER THE U.S. CONSTITUTION.....	5
A. The Purpose Of RICO Is Not To Restrain Protected Speech. Any Impact On Speech Is Incidental To Lawful Non-Speech Related Enforcement Activities.....	8
B. RICO Forfeiture Does Not Create An Unconstitutional Prior Restraint.....	11

II.	THE EIGHTH AMENDMENT WAS NOT VIOLATED BY THE FORFEITURE OF ALEXANDER'S PORNOGRAPHY EMPIRE.....	17
-----	--	----

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<u>Alexander v. Thornburgh,</u> 943 F.2d 825 (8th Cir. 1991).....	8
<u>Arcara v. Cloud Books,</u> 478 U.S. 697 (1986).....	14,15
<u>4447 Corp. v. Goldsmith,</u> 504 N.E.2d 559 (Ind. App. 1985).....	10,16
<u>Cox v. Louisiana,</u> 379 U.S. 559 (1966).....	15
<u>Fort Wayne Books, Inc. v. Indiana,</u> 489 U.S. 46 (1989).....	8,14,18
<u>Giboney v. Empire Storage & Ice Co.,</u> 336 U.S. 490 (1949).....	15
<u>Near v. Minnesota,</u> 283 U.S. 697 (1931).....	17
<u>Paris Adult Theatre I v. Slaton,</u> 413 U.S. 49 (1973).....	18
<u>Russello v. United States,</u> 464 U.S. 16 (1983).....	7
<u>U.S. v. 37 Photographs,</u> 402 U.S. 363 (1977).....	10

United States v. Pryba,
900 F.2d 748 (4th Cir. 1990).....13

United States v. Turkette,
452 U.S. 576 (1981).....7

Vance v. Universal Amusement Co.,
445 U.S. 308 (1980).....14

Other Authorities

Final Report of the Attorney
General's Commission on
Pornography,2,7,9

CONSENT OF THE PARTIES

Attorneys for Appellant and Appellee have consented to the filing of an amici curiae brief by National Family Legal Foundation and Children's Legal Foundation.

INTEREST OF AMICI CURIAE

National Family Legal Foundation ("NFLF") is a non-profit legal organization founded in 1990. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. It also provides legal assistance to victims of pornography.

NFLF's former Executive Director, Alan E. Sears, was also the Executive Director of the Attorney General's

Commission on Pornography. In that capacity he oversaw and supervised the drafting of the Final Report of the Attorney General's Commission on Pornography, which listed as Recommendation Number 1 that "Congress should enact a forfeiture statute to reach the proceeds and instruments of any offense committed under the Federal Obscenity laws."

Children's Legal Foundation ("CLF") is a national, non-profit, public interest corporation based in Phoenix, Arizona. CLF has a 35-year history of opposing child pornography and obscenity, having filed more than 50 amicus curiae briefs with this Court on virtually every major obscenity and child pornography issue in the past three decades.

NFLF and CLF seek to file an amicus curiae brief in support of the United States in this case. Both are

concerned with the toll illegal pornography takes on society
and believe that RICO forfeiture is a necessary and
constitutional method of combatting this problem.

SUMMARY OF ARGUMENT

- I. THE PURPOSE OF RICO IS TO FIGHT ORGANIZED CRIME. MOST OBSCENITY IN THE UNITED STATES IS DISTRIBUTED BY ORGANIZED CRIME. THUS THE USE OF RICO, AND THE RESULTING FORFEITURE OF ASSETS, IS SUPPORTED BY THIS PURPOSE.
- II. THE PURPOSE OF RICO FORFEITURE IS NOT TO RESTRAIN PROTECTED SPEECH, BUT RATHER TO DISSOLVE CRIMINAL ENTERPRISES BECAUSE OF PAST CRIMINAL CONDUCT.
- III. RICO FORFEITURE DOES NOT CREATE AN UNCONSTITUTIONAL PRIOR RESTRAINT.
- IV. APPELLANT'S SENTENCE WAS NOT CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT.

LAW AND ARGUMENT

I. THE USE OF RICO WITH OBSCENITY
OFFENSES IS SUPPORTED BY THE PURPOSE
OF RICO AND PASSES MUSTER UNDER THE
U.S. CONSTITUTION.

Congress and various state legislatures¹ have added obscenity to their RICO statutes in order to fulfill the goals of RICO -- fighting organized crime -- not as a device to suppress protected material or to chill protected speech.²

Several reports, including the California Attorney General's 1987 Report on Organized Crime in California and the Final Report of the Attorney General's Commission

¹ Approximately fifteen (15) states currently have RICO statutes which include obscenity as a predicate offense.

² CONG.REC. § 433-458 (daily edition, Jan. 30, 1984) (statement of Sen. Helms). Senator Helms, in introducing the amendment that added "dealing in obscene matter" to the federal RICO statute, put into the record material showing the profits organized crime gains from the sale of illegal obscenity, and reiterated that RICO was intended to provide "a means of dealing with organized crime." *Id.* at § 433.

on Pornography, have concluded that organized crime is behind most of the production and national distribution of illegal, obscene pornography. The California report estimated that nationwide revenues from pornography range from \$7 billion to \$10 billion annually, "and organized crime is believed to be connected to most of this money." Attorney General's Report on Organized Crime in California at 7 (1987). It also concluded that "pornography was a lucrative part of organized crime operations" in California in 1986. Id. The Attorney General's Commission on Pornography endorsed the FBI's 1978 findings that:

... organized crime involvement in pornography ... is indeed significant, and there is an obvious national control directly, and indirectly, by organized crime figures of that industry in the United States. Few pornographers can operate in the United States independently without some involvement with organized crime. The huge profits gathered by organized crime in this area and redirected to other lucrative forms of crime, such as

narcotics and investment in legitimate business enterprises, are certainly cause for national concern ...

Final Report of the Attorney General's Commission on Pornography, at 1071 ("Final Report"). These conclusions were important factors in the decisions of Congress and various states to amend their RICO statutes by including obscenity as a predicate offense.

Indeed, this Court has recognized that the purpose of the federal RICO statute is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello v. United States, 464 U.S. 16, 26 (1983). Its provisions are to be construed liberally to bring about its remedial purposes. United States v. Turkette, 452 U.S. 576 (1981). One of the most important of those remedies is the forfeiture of assets. Russello, supra.

- A. The purpose of RICO is not to restrain protected speech. Any impact on speech is incidental to lawful non-speech related enforcement activities.

The record herein makes clear that the government's purpose is not to use RICO to restrain future expressive activities, but to seek the dissolution of an illegal "enterprise" or forfeiture of property because of past criminal conduct. The penalties are imposed for reasons unrelated to the suppression of speech. See Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989).

Appellant's (hereinafter "Alexander") activities are precisely the type of criminal enterprise for which RICO legislation was adopted. The Court of Appeals in Alexander v. Thornburgh, 943 F.2d 825, 827-829 (8th Cir. 1991) details Alexander's business operation -- fraudulent corporations, sham business dealings, the commingling of funds, money laundering, and tax evasion.

This is simply business as usual in the pornography industry. The Attorney General's Commission reported that:

The nature of the pornography business provides inviting opportunities for skimming on every level The often "cash only" business creates immense opportunities to launder money received from other organized crime activity Layers of corporations and hidden transactions of all descriptions are used by organized crime families involved in pornography to conceal true ownership and activities.

Final Report, at 1060, 1064.

Further, there is no question that Alexander has long been involved with organized crime, at least since 1970. This was detailed in the Final Report, at pages 1200-1202 (attached as Appendix A). Thus, despite Alexander's claim that the forfeitures in his case were disproportionate to the seven items found obscene, the industry and activities he developed are the exact type of criminal enterprise for which RICO statutes were intended.

RICO acts are designed as strong medicine against

the epidemic of organized crime involvement in the hard-core pornography racket, as they are in other activities of organized crime. The central theory of RICO is that the corruption of a business through crime, whether drugs, prostitution, arson, or obscenity, makes that enterprise subject to treatment as an unlawful depository of economic interests. Once corrupted, such an enterprise may be treated as having assets subject to forfeiture to prevent unjust enrichment from contraband. U.S. v. 37 Photographs, 402 U.S. 363, 376-77 (1977).

How an enterprise is proven to have been corrupted is unrelated to what type of enterprise it is. 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 565 (Ind. S.Ct. 1987). The aim of forfeiture statutes is to prevent criminals from intentionally using a business scheme to make, launder, or dispense proceeds of illegal acts and to punish such unfair business practices by depriving them of their poison fruit.

B. RICO forfeiture does not create an unconstitutional prior restraint.

Alexander argues that the RICO forfeiture in this case -- the destruction of a "media business" -- constitutes an unconstitutional prior restraint. Appellant's Brief at 10. First, to call his chain of peep show booth operations, topless dancing clubs, and other sex shops, a "media business" and compare it to a "broadcast network" is innovative but highly misleading. The record is clear that Alexander for more than twenty years has been involved in the distribution of hard-core pornography, i.e., materials where sexual penetration is clearly visible, in violation of federal and most state obscenity laws. But no matter how Alexander wants to classify his business, the forfeiture here did not result in an unconstitutional prior restraint.

Section 18 U.S.C. 1963, provides for forfeiture to the United States of:

- (1) any interest the person has acquired or maintained in violation of section 1962;
- (2) any –
 - A) interest in;
 - B) security of;
 - C) claim against; or
 - D) property or contractual right of any kind affording a source of influence over;any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and
- (3) any property constituting, or deriving from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962 (emphasis added).

The only property subject to seizure and forfeiture is that which has a nexus to the corrupt organization. It matters not that some of the property seized may be constitutionally protected.

The First Amendment is not violated when there is a nexus established between the ill-gotten gains from

racketeering activity and the protected materials forfeited. United States v. Pryba, 900 F.2d 748, 755 (4th Cir.), cert. denied, ____ U.S. ____, 112 L.Ed.2d 258 (1990). That connection was established here. The Court specifically and properly limited the forfeiture to profits, real estate, and businesses directly related to Alexander's interstate transportation and sale of illegal hard-core magazines and videos. 943 F.2d at 835. Alexander wishes this Court would ignore the jury's and trial court's finding -- beyond a reasonable doubt -- of his extensive illegal dealings and his control of this corrupt enterprise. Id. at 829. Rather, he desires the Court to focus on seven videos and magazines, in a vacuum, and ignore the overwhelming evidence that Alexander's illegal dealings go well beyond the sale of these specific items.

Once convicted, the criminal cannot protect his ill-gotten lucre by commingling and investing in a so-called "First Amendment" business. Otherwise, racketeers of all

persuasions would simply become publishers to avoid RICO forfeitures. See Fort Wayne Books, supra.

Obviously, some inconvenience to speech is caused by all criminal laws, including RICO. In every case where a person is imprisoned for distributing obscenity, the imprisonment limits that criminal's ability to distribute communicative material, as two justices of this Court noted in Vance v. Universal Amusement Co., 445 U.S. 308, at 320, 324 (1980) (Justices White and Rehnquist). See also Arcara v. Cloud Books, 478 U.S. 697 (1986) ("... every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities.") But under Alexander's reasoning, a person could engage in the RICO predicate offenses of prostitution, restraint of trade, or trafficking in stolen property at a commercial establishment which also sells paperback novels, and this would immunize the establishment from forfeiture. This would obviously provide a loophole for organized crime to avoid the

intended impact of RICO and defeats the purpose of the statute.

This Court has repeatedly recognized that it does not abridge freedom of speech to make a course of conduct -- in this case racketeering -- illegal, even though the conduct is in some respect carried out by means of expression. Cox v. Louisiana, 379 U.S. 559, at 563 (1966) ["... it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." Quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490 at 502 (1949)].

Arcara v. Cloud Books, *supra*, is squarely on all fours. There, this Court upheld the closure of a pornography bookstore that was also used as a place of prostitution. The nuisance abatement legislation in Arcara was concerned with unlawful conduct and only incidentally

related to expression. This decision is directly on point: "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal use of premises." 478 U.S. at 707. So long as there is no "speech suppressive motivation or policy" shown in the enforcement of the RICO statute and resulting forfeiture, it is constitutional. 478 U.S. at 707, N.4 (emphasis added).

Because RICO is an attempt to compel forfeiture of property used in racketeering activity and not to restrain the future distribution of expressive materials, it does not violate the First Amendment. 4447 Corp., 504 N.E.2d at 565.

An unconstitutional prior restraint is not created simply because a person's speech is restrained or inconvenienced as the unintended and incidental result of a legitimate statute. Arcara, supra. As with most criminal statutes, every one of the predicate offenses under any

RICO statute can arguably result in incidental suppression of speech. This is particularly so if the property used in the racketeering activity is a store that sells expressive materials. As long as the legislation is directed at unlawful conduct, and not motivated by suppression of speech, [which was clearly the purpose of the statute found unconstitutional in Near v. Minnesota, 283 U.S. 697 (1931)], the purpose of the RICO forfeiture cannot be frustrated because the criminal activity is intertwined with expression.

II. THE EIGHTH AMENDMENT WAS NOT VIOLATED BY THE FORFEITURE OF ALEXANDER'S PORNOGRAPHY EMPIRE.

The forfeiture of Alexander's business assets was not cruel and unusual punishment prohibited by the Eighth Amendment. Contrary to his argument that obscenity is a "minor", "victimless and relatively nonserious crime" (Appellant's Brief, at 44-45) are the findings of the Attorney General's Commission on Pornography, which

documented the vast numbers of victims of the pornography industry. Also, his position ignores this Court's statements concerning the governmental interests involved in regulating obscenity:

These include the interest of the public in the equality of life and the total community environment, the tone of commerce in the great city center, and, possibly, the public safety itself. ... The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, at 58, 63 (1973). Further, this Court in Fort Wayne Books described obscenity as a "substantive" crime. 489 U.S. at 57.

Obscenity is a serious crime, closely controlled by organized crime, which imposes an enormous cost, seen and unseen, on American society. Considering the damage

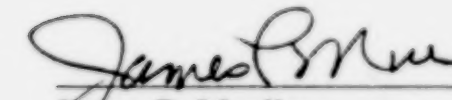
inflicted by illegal pornography and Alexander's long history of involvement in this "industry", his sentence seems highly appropriate.

CONCLUSION

For the above-stated reasons, the decision of the
Court of Appeals should be affirmed.

Dated October 29, 1992.

Respectfully submitted,

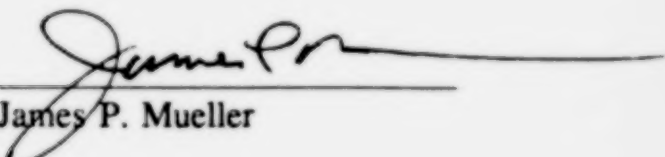

James P. Mueller
Counsel of Record
Len L. Munsil
5353 North 16th Street, Suite 400
Phoenix, Arizona 85016
(602) 265-1513

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing
Brief of Amici Curiae have been sent by U.S. Mail, Postage
Prepaid, on this 29th day of October, 1992, to:

KENNETH W. STARR
Solicitor General
The Solicitor General's Office
U.S. Department of Justice
Room 4153
10th & Pennsylvania Avenue, NW
Washington, D.C. 20530

JOHN H. WESTON
WESTON, SARNO, GARROU & DEWITT
433 N. Camden Drive
Suite 900
Beverly Hills, CA 90210


James P. Mueller

APPENDIX A

[Excerpt from pages 1200-1202 of the Attorney General's Commission on Pornography Final Report]

Zaffarano's businesses, Stu Segall & Associates and Miracle Film Releasing Company. Dominick Raffone, Michael Rizzitello (former member of the Joey Gallo LCN Family in New York), Jack LoCicero, James Fratianno and Thomas Ricciardo (member of the Joseph Columbo Family in New York) were indicted by a Los Angeles federal grand jury on charges of attempting to extort up to \$20,000 from local pornographers and a dummy pornography business set up by the F.B.I. Also, a known pornography distributor in Minneapolis, Minnesota, Ferris Alexander was stopped in Los Angeles, California, in the company of William Bittner, also known as William Haimowitz on February 11, 1974. On May 15, 1975, a truckload of pornographic materials was hijacked in St. Paul, Minnesota. The owner of the truck and person reporting the crime was Michael Kaplins

of 2014 Westchester, Baltimore, Maryland. At this time, Mr. Kaplins stated that the shipment was being shipped from Bon Jay Sales, 6601 Moravia Park Drive, Baltimore, Maryland, (formerly 600 Aisquith St., Baltimore, Maryland) to a party named Ferris and gave a phone number which was later traced to Ferris Alexander. On September 8, 1975, several cartons of pornographic booklets being shipped by Emery Air Freight broke open. Emery officials refused to deliver the shipment and notified federal and local authorities. The shipment was found to contain material displaying young children and adults in pornographic activity. The pornographic material [page 1200] was being shipped from Atlantic Distributors, #9 Ford St., Providence, Rhode Island, to Magazine Agency, 419 Hennepin Ave., Minneapolis, Minnesota, which is owned by Ferris Alexander.

In 1970, Ferris Alexander was convicted of interstate

transportation of obscene material in federal court, along with Samuel Manarite, a member of the Vito Genovese Family and Richard J. Portela. In 1972, Ferris was sentenced to Sandstone Penitentiary where he served 9 of 18th months and paid a \$20,000 fine.

An identified supplier of pornographic films to Alexander through correspondence, as indicated below, is William and Lewis Mishkin and their Motion Pictures, Inc., 1501 Broadway, New York, New York, dated November 12, 1975:

I hope that by now you have had your first playdate on the INTIMATE TEENAGERS, and that the results were as good as they have been all over the country.

I would appreciate learning when you will be through with the prints. I am not rushing you, but we have been considerably more successful, with this film that we had originally anticipated, and with the negative in Europe, this has caused us a print problem.

I have several other films that you might be interested in, including THE

FILTHIEST SHOW IN TOWN (Harry Reems
and Tina Russell), ADULT PLAYPEN.....

A partial list of recorded calls from Alexander's main warehouse at 20 North 14th St., Minneapolis, Minneapolis [page 1201] revealed telephone calls to several known businesses and individuals involved in the pornography industry such as Kenneth Guarino, William Mishkin, Stu Segall & Associates, Star Distributors, Ltd., David Grama, Robert Eugene Smith, Samuel Haimowitz, Lyndon Distributors, Bon Jay Sales, Inc., Norman Arno and the Mitchell Brothers Film Group.

Will Bittner was arrested for operating a warehouse in which 1.5 million dollars of hardcore pornographic material was confiscated. Also arrested with William Bittner was Anthony Zappi who is the secretary/treasurer of Teamsters Union 854 in New York City. William Bittner is currently operating the Lauderdale Beach Hotel, 101 S. Atlantic Blvd., Ft. Lauderdale, Florida. Donald Embinder

is the president of the hotel. Ronald Zappi is an employee, as well as Robert Barkow, who is also the production consultant for Blueboy Magazine.

Bittner also operates the Suki, Inc., dba Pojo, a hardcore pornography distribution business with his step brother Samuel Haimowitz. William Bittner stated to F.B.I. agents he sometimes used his step father's name, William Haimowitz. When the Suki warehouse was searched, it was established that they were doing a nationwide business. Records indicated that they were grossing \$40 to \$50 thousand per month on magazine sales alone. When added to their film distribution business, the estimates of their yearly sales was grossing about 1-1/2 million. The [page 1202]....